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IN THE

# Supreme Court of the United States

October Term, 1958

No. 341

RUBY FREDRICKA SHUTTLESWORTH, by her next friend,
F. L. SHUTTLESWORTH, ET AL., *Appellants*,

v.

BIRMINGHAM BOARD OF EDUCATION, *Appellee*.

**On Appeal From the United States District Court for the Northern District of Alabama**

## MOTION OF APPELLEE TO DISMISS OR AFFIRM

ORMOND SOMERVILLE
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JOS. F. JOHNSTON
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### OPINION BELOW

The opinion of the District Court is reported in 162 F. Supp. 372.

NOTE: Appellee is improperly designated in the pleadings below and in the jurisdictional statement herein as "Birmingham Board of Education

of Jefferson County, Alabama." The proper designation is Birmingham Board of Education which is an agency of the City of Birmingham, and not of Jefferson County.

## MOTION TO DISMISS

Appellee moves for a dismissal of this appeal in accordance with Rule 16 of the Revised Rules of this Court.

The appeal should be dismissed for want of jurisdiction. This is not a proper case for a three judge court, and hence not directly appealable, for the reason that the Alabama Act, the constitutionality of which is the sole issue in the case, is patently valid on its face, no questions of unconstitutional administration are presented, and such questions, in any event, are not within Section 2281 of the Judicial Code.

The unanimous judgment of the three judge District Court is of course effective, as the court noted, but only as the judgment of a regular district court, and hence appealable only to the Circuit Court.

## MOTION TO AFFIRM

### The Constitutional Question Urged is Premature and Abstract

Appellee moves in the alternative for an affirmance of the judgment of the District Court in accordance with Rule 16. This appeal is so lacking in substantial basis in the record as to require summary affirmance, if not dismissal. It seeks a determination by this Court that an Alabama statute dealing with the assignment and placement of pupils in public schools is "unconstitutional on its face," without the slightest effort to show that even if that were the case, the appellants would be entitled to any judicial relief.

The appellants, in submitting their case below, expressly disclaimed any purpose to prove application to them by appellee of any specific provision of the statute. Counsel for appellants said to the Court:

> "JUDGE RIVES: The point is, you are relying upon the statute itself and not the administration.
>
> MR. WASHINGTON: We are not relying on the administration. We are not talking about the application of the statute but the statute itself."
>
> R.....

At the time of submission for final decree the fact was that the placement law had in no sense been "enforced against plaintiffs, or administratively applied with respect to them. As the court below held:

> "It is possible for the Act to be applied so as to admit qualified Negro pupils to nonsegregated schools. . . . We cannot say, *in advance of its application,* that the Alabama Law will not be properly and constitutionally administered . . . the plaintiffs are not in position to show upon what particular ground they were not permitted to attend the schools of their choice."
>
> R. p. , 162 F. Supp. 381-2 (Emphasis supplied).

There would be and is adequate basis for the action or nonaction of the Birmingham School Board involved on this record, even in the absence or invalidity of the Placement Act, in the long established general school administration provisions of the Code of Alabama (1940, T. 52 §§ 151, 158), which the appellants do not attack, as the court pointed out (R. , 162 F. Supp. 378).

The District Court properly rejected the argument of appellants, repeated here (Jurisdictional statement

p. 13), that the placement law "freezes" the old compulsory segregation in the schools. Sections 2 and 3 of the statute do not have any such effect. Their clear intent and effect was merely to state a legislative admonition against too hasty re-shuffling of school populations, with attendant confusion, and to emphasize the responsibility of local Boards of Education to consider individual pupils in the light of the standards laid down.

The Supreme Court of Alabama has expressly rejected the argument that the Placement Act "froze" pupils in the schools previously attended, in *Ex Parte Board of Education of Blount County* (1956) 264 Ala. 34, 84 So. 2d 653, 656-7. The Court said:

> "Respondent contends that enactment of the placement bill froze every student in the school he had been attending previously, and further that local boards are thereafter prohibited from transferring any student or group of students without a finding by the board or its authority that such transfer is as to each individual pupil consistent with the test of the public and educational policy governing the admission and placement of pupils in the public school system prescribed by the act.
>
> We are of the opinion that repondent is mistaken only in his original premise: the Act was one designed to give the public school system flexibility, not rigidity; thus it did not so freeze pupils to their schools. Rather, it gave the local board full authority to place and replace students within its jurisdiction. The primary purpose of the Act was to fix responsibility for placement; the method chosen was the granting of wide discretionary powers to the local school board."

It should be noted that the *Blount County* case is also an effective answer to the contention of the appellants

that the sole purpose and effect of the legislation was the maintenance of segregation. The *Blount County* case involved a dispute wholly unrelated to the question of segregation. It emphasizes the completely unjustified character of this attempt to have the entire law declared invalid without regard to its application.

Furthermore, as the District Court pointed out (162 F. Supp. 383), the statute contains a severability clause which is given full effect under Alabama decisions, and appellants have no standing to attack particular sections in the absence of any proof that those sections have been applied against them.

The opinion of the District Court takes cognizance of the existence of the severability provision in the Act, and of the Alabama decisions giving effect to the presence of such a provision in the statute. Page 383, 162 F. Supp., citing *Alabama State Federation of Labor* v. *McAdory,* 246 Ala. 1, 18 So. 2d 810; *Opinion of Justices,* 247 Ala. 195, 23 So. 2d 505; *Newton* v. *City of Tuscaloosa,* 251 Ala. 209, 36 So. 2d 487. Such a provision is contained in Section 14 of the present Placement Law (appellants' "Appendixes", page 51a), reading as follows:

> "Section 14. The provisions of this Act are severable, and if any section *or provision* of this Act shall be held to be in violation of the Constitution of Alabama or of the United States, such decision shall not affect the validity of enforceability of the remainder of this Act." (Emphasis supplied).

Thus the intention of the Legislature is well expressed, that not only whole sections but component provisions are to be eliminated in order that the constitutionality of the Act be upheld.

Any prediction at this time as to what the Supreme Court of Alabama will hold relative to the validity or invalidity of any section, or provision (paragraph, sentence or clause), of the Act, and the effect of such invalidity, in a case properly presenting any application of a particular provision would be futile conjecture.

**The Sole Issue Presented and Decided Below**

The plaintiffs (appellants) not only failed to show application of any particular provision of the statute to them, but carefully avoided any effort to prove discrimination in fact with respect to their school assignments. As the court below points out:

> "The parts of the complaint denied by the defendant are those alleging discrimination against the plaintiffs, . . . As to such disputed parts of their complaint, the plaintiffs offer no evidence, but rely entirely upon the judicial knowledge of the Court. . ." R. p. ; 162 F. Supp. 375-6.

The plaintiffs' case was and is deliberately confined to the attempt to secure a declaration by the District Court, and now by this Court, of the unconstitutionality of the Alabama School Placement Law, Acts Regular Session 1957, Vol. 1, p. 482, however administered.

Although the appellants' jurisdictional statement states three other questions (pp. 3, 4), it seems clear that these are mere paraphrases of or arguments on the one question presented to and dealt with by the District Court, i.e. insistence on the inherent invalidity as an abstract proposition of the Alabama Placement Act as a whole, and on its face.

**The Alabama School Assignment Laws Are Plainly and Wholly Consistent With the Brown Decision**

The original school placement law was enacted by the Alabama legislature in response to the *Brown* decisions. A principal purpose was to repeal the provision of law which had been in effect for generations, requiring separate schools for the white and negro races. Gen. Acts 1955, p. 492, Sec. 10.

This was done in the face of the existing mandate of the Alabama Constitution, Section 256, and of course the action presumably was based on the acceptance of the effect of *Brown* as invalidating the constitutional and statutory provisions for mandatory racial separation. The Legislature doubtless considered that legislation became imperative to validate continued operation of public schools and the appropriations to maintain them.

Thereafter the Constitution of the state was also amended to eliminate compulsory segregation, (Section 256, copied in Note 8, 162 F. Supp. 379), after which the Placement Law was re-enacted with certain amendments not material here.

It is thus beyond possible ambiguity or debate that the Alabama constitutional and statutory scheme in its entirety, and the Placement Act in particular, authorize the operation by the State of integrated public schools. As the court below expressly held, "It is possible for the Act to be applied so as to admit qualified Negro pupils to nonsegregated schools." (R. , 162 F. Supp. 381)

This indisputable constitutional and statutory effect requires summary affirmance of the judgment.

We do not deny or attempt to minimize the shocked reaction of the legislature and people of Alabama to the decision in *Brown*. But that reaction does not impair the concrete action taken in responding to the decision by repealing the statutory mandate of segregation.

The legislation doubtless was and is also designed to lessen the shock and to prevent, so far as possible, undue and unnecessary disturbance and confusion in the educational system, and in social tranquillity; but appellants' argument as to the ulterior purpose or motive of the legislature is not supported by the facts or the text and was properly rejected by the court below. It is, furthermore, at best an assertion that the statute may be improperly and unconstitutionally administered, as to which no proof was attempted.

The Alabama constitution and laws contain none of the mandatory provisions for separation, none of the prohibitions of the expenditure of public funds for nonsegregated schools, nor the compulsory closings of schools which were the basis for the invalidation of the Virginia laws in *School Board of Newport News* v. *Atkins*, 240 F. 2d 325 (4th Cir. 1957).

On the contrary, as held below, the Alabama statutory situation is very similar to that in North Carolina, sustained in *Carson* v. *Warlick*, 238 F. 2d 724 (4th Cir. 1956) cer. den. 353 U.S. 910 (1957), under which nonsegregated public schools are being operated. The basic statutory framework for administration of the Alabama school system was amended by this legislation to absorb or adjust to the shock of the *Brown* decision, primarily by decentralizing the responsibility for adjustments to each individual school district. The

obvious reason for this is the wide diversity of conditions and population characteristics which exist in Alabama, as in many other states, and the recognition of the importance of careful attention to the capacities and achievement levels of individual pupils, in making assignments.

The effort of the appellants in this case to have this Court invalidate the statutory plan of school assignment throughout the state of Alabama, without any showing of specific application or injury, is ill-conceived and mischievous in the extreme. Nothing could contribute more to bringing about a state of complete chaos than to have this Court pronounce the entire school administration system of a state invalid without reference to specific application in individual cases, at a time when there is already sufficient confusion and emotional tension in the area of public education. It is inconceivable that the Court should seriously consider any such effort.

No substantial constitutional or other question for decision here is presented by this appeal, and the judgment below should be summarily dismissed or affirmed.

Respectfully submitted,

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